

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**CHARLES W. BRANDT**

Claimant

VS.

**BROWNING FERRIS**

Respondent

Self Insured

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Docket No. 222,208

**ORDER**

Both claimant and respondent appealed the November 15, 1999 Award and the January 7, 2000 Award entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument on June 20, 2000.

**APPEARANCES**

Roger A. Riedmiller of Wichita, Kansas, appeared on behalf of claimant. Lyndon W. Vix of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the Board considered the exhibits introduced at the deposition of Dr. Philip R. Mills. Dr. Mills saw claimant as a result of a court ordered independent medical examination. Furthermore, the medical records attached to his deposition transcript were offered by claimant with no objection by respondent. Claimant cannot now object to those records. The record also contains two transcripts not listed by the ALJ in either Award - the deposition of Susan L. Martin, dated October 18, 1999, and the June 24, 1999, Continuation of Regular Hearing.

**ISSUES**

This is a claim for a series of traumas through claimant's last day of work which resulted in bilateral lower extremity and neck injuries. In the January 7, 2000 Award, Judge Frobish found that respondent did not make a good faith job offer to claimant that accommodated his restrictions but thereafter claimant failed to make a good faith effort to find appropriate employment. Therefore, the Judge imputed a wage based upon claimant's ability to earn wages and awarded a 46 percent permanent partial general disability.

Claimant contends Judge Frobish erred. Claimant argues that he made a good faith effort to find appropriate employment and, therefore, should be awarded a work disability based upon his actual wage loss. Conversely, respondent argues that claimant should be denied benefits, but if the accident is found to be compensable, then claimant should be limited to an award based upon his percentage of functional impairment.

The issues before the Appeals Board on this review are date of accident, notice, written claim and the nature and extent of claimant's disability, including whether claimant's wage loss should be based upon his actual earnings or if, instead, a wage should be imputed based upon claimant's ability to earn.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Except as to the contents of the record, as set forth above, the Appeals Board concludes the ALJ's two Award orders should be affirmed. The Appeals Board adopts the findings and conclusions set forth in those Awards.
2. Claimant developed bilateral upper and lower extremity injuries and also aggravated a preexisting degenerative condition in his spine while working for respondent. After claimant was released to return to work with restrictions on February 22, 1999, respondent was not able or not willing to accommodate those work restrictions. Respondent only offered to return claimant to the same job he had been doing.
3. Claimant last worked for respondent on or about February 22, 1999. Therefore, February 22, 1999 is the date of accident for purposes of notice and written claim. Based upon that accident date, notice and written claim were timely.
4. Because claimant suffered an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk<sup>1</sup> and Copeland.<sup>2</sup> In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, the Court of Appeals held that for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.<sup>3</sup>

5. The Kansas Appellate Courts have further interpreted K.S.A. 44-510e to require workers to make a good faith effort to continue their employment post injury. The Court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions.<sup>4</sup> Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.

6. Likewise, employers are encouraged to accommodate an injured worker's medical restrictions. In so doing, employers must also act in good faith. In providing accommodated employment to a worker, Foulk is not applicable where the accommodated job is not genuine<sup>5</sup> or not within the worker's medical restrictions,<sup>6</sup> or where the worker is fired after attempting to work within the medical restrictions and experiences increased symptoms.<sup>7</sup> In this instance, the job respondent offered claimant was not within his

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<sup>1</sup> Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

<sup>2</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>3</sup> Copeland at 320.

<sup>4</sup> See, e.g., Oliver v. The Boeing Company-Wichita, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* \_\_\_\_ Kan. \_\_\_\_ (1999), and Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* \_\_\_\_ Kan. \_\_\_\_ (1998).

<sup>5</sup> Tharp v. Eaton Corp., 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

<sup>6</sup> Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

<sup>7</sup> Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

restrictions and despite its knowledge of those restrictions, respondent made no offer to change claimant's job duties to accommodate those restrictions.

7. Claimant's job search activities may have been impeded by the family's anticipated move to Arkansas. But even considering this circumstance, the Appeals Board concludes claimant did not make a good faith job search. Therefore, for purposes of determining claimant's permanent partial general disability, the post-injury wage that claimant was capable of earning after he was released to return to work with permanent restrictions should be imputed. Because claimant's wage earning ability is not at least 90 percent of the pre-injury average weekly wage, claimant's permanent partial general disability should be based upon a work disability. The Board agrees with the ALJ's determination that claimant's work disability is 46 percent, based upon a 63 percent wage loss and a 29 percent tasks loss.

### **AWARD**

**WHEREFORE**, the Appeals Board affirms the Award dated November 15, 1999 and the January 7, 2000 Award entered by Administrative Law Judge Jon L. Frobish.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS  
Lyndon W. Vix, Wichita, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director